REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E081 OF 2024

(Before Hon. Justice Dr. Jacob Gakeri)

KIBOS DISTILLERS .....APPELLANT

VERSUS

WALTER ODHIAMBO JUMA.....RESPONDENT

JUDGMENT

This is an appeal against the Judgment of Hon. K. Cheruiyot, SPM in Kisumu CMELRC No. E171 of 2021, **Walter Odhiambo Juma V Kibos Distillers Ltd**, delivered on 28th May, 2023.

The brief facts of the case are that the appellant employed the respondent on 20th November, 2017 as a Lab Analyst and appear to have served diligently until May 2024 when the appellant accused him of stealing extra natural alcohol ENA, was issued with a notice to show cause, responded in writing, was suspended, invited for a disciplinary hearing by sms and accorded one day notice, attended the hearing and was dismissed from

employment vide letter dated 14th June, 2021 and acknowledged receipt.

The respondent challenged the dismissal from employment on the premises that it was unfair. He faulted the suspension, short notice to attend the disciplinary hearing, could not secure a witness and was not given specific charges.

The respondent prayed for damages for wrongful termination, leave allowance, Certificate of Service, costs and interest.

The appellant admitted that the respondent was its former employee and after he was suspended on 24th May, 2021, investigations showed that he was involved in the theft of ethanol from the respondent's premises and was taken through the disciplinary process.

After considering the evidence availed, and submissions by counsel for the parties, the learned trial magistrate found that the termination of the respondents employment was substantively unjustifiable and procedurally unfair and awarded the respondent salary in

lieu of leave, 12 month's salary compensation, costs, interest and certificate of service, Kshs.316,000.00

Less the sum paid Kshs.33,086.00

Balance Kshs.282,914.00

This is the judgment appealed against.

The appellant faulted the judgment of the trial court on seven (7) grounds set out in its Memorandum of Appeal dated 20th December, 2024, all based on the evidence adduced in the trial court.

The trial magistrate is faulted for having erred in law and fact by:

(a) Disregarding the discharge voucher on record.

(b) Misapprehending the evidence on record and thus arriving at an erroneous conclusion.

(c) Misapprehending the provisions of Section 44 of the Employment Act.

(d) Failing to appreciate the role played by the respondent in the separation.

(e) Lowering the standard of proof to the prejudice of the appellant.

(f) Disregarding the evidence tendered by the appellant and

(g) *The judgment of the trial court was against the weight and tenor of the evidence on record.*

The appellant prayed that the appeal be allowed and the judgment of the trial court set aside and the respondent's claim dismissed with costs.

By the time the court retired to prepare this Judgment none of the parties had filed submissions.

This being a first appellate the duty of this court is to conduct a retrial as laid down in **Peters V Sunday Post Ltd [1958] EA 424** and restated in numerous decisions such as **Selle & Another V Associated Motor Boat Co. Ltd & Others [1968] EA 123, James Abok Odera t/a A. J. Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** and **Mwanasokoni V Kenya Bus Services Ltd [1985] KLR 931,** among others.

In **Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR** the Court of Appeal stated:

> *"An Appeal to this court from a trial ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they*

are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect".

A perusal of the grounds of appeal leave no doubt that the appellants case is grounded on how the learned trial magistrate appreciated and applied the evidence placed before the court.

The respondent availed documentary evidence in the form of letter of suspension dated 24th May, 2021, print out of the sms inviting him for the disciplinary hearing, response to the notice to show cause, letter of termination of employment and clearance form.

The appellant on the other hand availed a copy of a cheque of Kshs.33,086.00 paid to the respondent, copy of an executed discharge voucher, minutes of the disciplinary hearing, copy of the sms, response to the suspension/notice to show cause, suspension letter, photos of plastic bottles, incident report dated 24th May, 2021, employment form and leave application forms.

The documentary evidence was uncontested.

On cross-examination, the respondent admitted that he was a Laboratory Assistant and was accused of stealing ethanol which he had access a fact he admitted. He also testified that Mr. Nyapara was also dismissed from employment.

He further admitted having attended the hearing, signed attendance register, the discharge voucher and receipt of the cheque.

He admitted having been paid in *lieu* of notice and the days worked in June.

Mr. David Moli Odungo, the appellant's Human Resource Manager admitted that he received the information from Mr. Ngewyo on 24th May, 2021 and attended the hearing but admitted that no investigation report was produced in court and had invited the respondent for the disciplinary meeting by sms.

The witness admitted that the appellant did not inform the respondent his right to be accompanied by an

employee of his choice and the discharge summary was accurate.

From the evidence on record, the trial court found that the appellant had not proved the theft of ethanol as it ought to have been proved beyond reasonable doubt, which was a misdirection because being a civil suit, the standard of proof was on a balance of probabilities. See in this regard **Miller V Minister of Pension [1947] ALLER 372, James Muniu Mucheru V National Bank of Kenya Ltd [2019] eKLR**, **Jackson Mwambili V Peterson Mateli [2020] eKLR** and **Palace Investment Ltd V Geoffrey Kariuki Mwenda & another [2015] eKLR**.

It must be demonstrated that the alleged fact was more probable than not.

By ascribing the standard of proof beyond reasonable doubt applicable in criminal cases, the trial court prejudiced the appellant's case.

For a termination of employment to pass muster it must be proved that the employer had a substantive justification to terminate the employee's services and did

so in accordance with a fair procedure as held in **Walter Ogal Anuro V Teachers Service Commission [2013] eKLR**.

Under Section 43 of the Employment Act.

(1) …

(2) (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

This provision has been construed to mean that all that the employer is required to show is that it had sufficient and reasonable basis to genuinely believe that it had a reason to terminate the employee's employment. See **Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eKLR**.

In **Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others [2019] eKLR**, the Court of appeal observed:

"The standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required

to prove are the reasons it "genuinely believed to exist" causing it to terminate the employee's services. That is a partly subjective test". See also **Bamburi Cement Ltd V William Kilonzi [2016] eKLR**.

In charging and prosecuting the respondent, the appellant used the incident report dated 24th May, 2021 and the photographs of used plastic bottles found by the security officer, who suggested names of the persons most likely involved.

Puzzlingly, no investigation report was produced yet the suspension letter was explicit that the respondent's suspension was pending investigation.

Similarly, there was no evidence to show that the respondent was interviewed on the issue or any other step was taken before the disciplinary hearing. The respondent's role in the alleged theft was not demonstrated.

In the court's view the appellant did not adduce evidence to demonstrate that it had reasonable and sufficient basis for its belief that the respondent was implicated in the theft of ethanol.

Evidently, investigation would have revealed the real culprits.

The foregoing is also discernible from the absence of a notice to show cause with a clear allegation(s) and relevant particulars.

Equally, the letter of termination of employment did not identify the reason(s) for termination of the respondent's employment. To that extent, the court is not persuaded that the appellant demonstrated that it had a substantive justification or valid and fair reason to terminate the respondent's employment.

Section 44 of the Employment Act identifies specific types of conduct which amounts to gross misconduct and stealing falls in that category.

However, the allegation ought to be supported by verifiable evidence. The factual circumstances or particulars are more critical than the allegation. In this case, the appellant's case was based on an unsubstantiated allegation.

This is vividly demonstrated by the fact that during the hearing neither the documents nor witnesses were availed to give evidence.

An investigation report would have revealed when ethanol stolen, how much, method used and the persons involved. The fact that the respondent had access to ethanol was not sufficient evidence that he was the one who stole it bearing in mind that RWI confirmed that it was not consumable.

In sum the appellant failed to adduce evidence connecting the respondent to the alleged theft of ethanol and thus it failed to discharge the burden of proof that it had a substantive justification to terminate the respondent's employment as by law required.

The court is in agreement with the finding of the trial court that termination of the respondent's employment by the appellant was substantively unfair.

On procedure, it is patently clear that the appellant committed various fundamental procedural flaws which rendered the termination of the respondent's services procedurally unfair. It is equally clear that the appellant

failed to comply with the provisions of Section 41 of the Employment Act which are mandatory as held in **Pius Machafu Isindu V Lavington Security Guards Ltd [2017] eKLR** and **Jane Samba Mukal V Ol Tukai Lodge Ltd [2013] eKLR**, which rendered the termination of the respondent's services procedural unfair in the following ways;

First, the respondent used a short message service (sms) to invite the respondent to the disciplinary hearing as the main method. A detailed notice setting out the reason for invitation, place, date and time of the meeting and the employee's rights is required. A single sentence sms falls below the prescribed threshold as held in **Postal Corporation of Kenya V Andrew K. Tanui [2019] eKLR**.

Second, the message did not inform the respondent that he had the right to be accompanied by a fellow employee of his choice or a shop floor union representative or a witness. This was a critical omission.

Third, the less than one (1) day notice of the meeting was undoubtedly inadequate for purposes of enabling the respondent secure a colleague or shop floor union representative for his defence, arguments he raised

before the trial court. The law insists on reasonable time which is dependent on the circumstances of each case. In the court's view at least 4 days, as a minimum.

Finally, at the disciplinary committee no evidence was adduced by way of an investigation report or witness testimony. The committee relied exclusively on the incident report of the security officer, which had not been furnished upon the respondent for perusal.

The appellant adduced no evidence to show that the document mentioned in the report implicated the respondent in person or the role he played in the alleged theft, bearing in mind that the appellant had no CCTV cameras at the time.

Needless to belabour, non-availment of the evidence the employer intends to rely on at the disciplinary hearing vitiates the process, because it jeopardizes the employee's right to fair hearing and impairs his/her ability to launch an effective defence to the allegations.

From the minutes on record, it is discernible that the charges were read out to the respondent by way of the agenda and he was accorded an opportunity to defend

himself, was notified of the outcome and informed of the right to appeal which he did not exercise.

See **Ol Pejeta Ranching Co. V David Wanjau Muhoro [2021] eKLR** and **Regent Management Ltd V Wilberforce Ojiambo Oundo [2019] eKLR**.

This far, and analogous to the trial magistrate, this court is satisfied and finds that termination of the respondent's employment by the appellant vide letter dated 14th June, 2021 was unlawful for want of procedural propriety and thus unfair within the meaning of Section 45 of the Employment Act.

On termination of the respondent's employment, the learned trial magistrate appreciated the evidence before the court and in the court's view, applied it correctly to find the termination of the respondents services by the appellant unfair.

The foregoing addresses grounds 2, 3, 4, 5, 6 and partly 7 of the grounds of appeal.

As to whether the learned trial magistrate disregarded the discharge voucher, it requires no belabouring that a

perusal of the six (6) page judgment delivered on 18th May, 2023 reveals that the trial court did not address its mind to the import or effect of the discharge voucher on record which the respondent admitted having signed after receiving payment.

The trial court merely deducted the amount paid by the appellant as terminal dues from the total award.

The failure by the trial court to examine and determine the import of the discharge voucher on the entire suit amounted, in the court's view, to a misdirection.

The principles that govern deeds of release, discharge vouchers and settlement agreements are well settled.

In **Coastal Bottlers Ltd V Kimathi Mithika [2018] eKLR**, the Court of Appeal stated as follows:
"Whether or not a settlement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly whether the same was voluntarily executed by the concerned parties".

The court expressed similar sentiments in **Thoma De La Rue Ltd V David Opondo Omutelema [2016] eKLR** that:

"We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligations and that it cannot preclude the Industrial court from inquiring into the fairness of a termination.

That is however, so far as were are prepared to go. The court has in every case, to make a determination if the issue is raised, whether the discharge voucher was freely executed when the employee was seized of all the relevant information and knowledge".

The court is guided by these sentiments.

In the instant case, and as adverted to elsewhere in this judgment, the respondent admitted on cross-examination that he signed the discharge voucher on record but did not know the contents.

The Discharge Voucher on record dated 29th July, 2021 under the title 'In the Matter of Payment of Terminal dues and Final Dues' stated in part

"I WALTER ODHIAMBO JUMA OF National Identity Card Number 27155372 and P. O. Box 374 ITEN former employee of M/s KIBOS DISTILLERS LIMITED P/F No. 02034 of P. O. Box 3115 Kisumu do hereby acknowledge that

(a) ...

(b) ...

I, in consideration for the *ex gratia* payment and receipt of KENYA SHILLINGS THIRTY THREE THOUSAND AND EIGHTY SIX ONLY (Kshs.33,086 via Cheque No.002685 dated 22nd July, 2024 (receipt of payment is hereby acknowledged), I hereby unconditionally, wholly and fully discharge the former employer from all past, present and future claims (financial, monetary and of any other nature) by me or on my behalf arising out of in respect to over and during my employment against the said Former Employer.

I hereby confirm and declare that I have read and understood the contents, substance and purport of this Discharge Voucher and that have willingly and voluntarily executed/signed the same.

DATE at KISUMU by the said

This 29th day of July 2021

LORNA O. ODHONG } ....

ADVOCATE SIGN. THUMB PRINT

Witnessed by Nyabara Onyango ID No.25223295, P. O. Box 566 SUNA
Cellphone No.0729993239

.....
SIGN.

To the respondent assertion that he did not know the contents of the discharge voucher, the common law has an answer that signature *prima facie* means acceptance as held in **L'estrange V Grancob [1934] 2 KB 394**.

In Parker V South Eastern Railway Co. [1877] 2 CPD 416 Mellish L J stated:
"In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents".

Maugham L. J. expressed similar sentiments in **L'Estrange V Grancob (supra)**.

In the instant case, the respondent's evidence that he did know the contents of the discharge voucher could not avail him having signed it in the presence of a witness Mr. Nyapara Osike Onyango. He was bound by its contents.

Significantly, the respondent did not allege fraud, misrepresentation, duress or undue influence on the part of the appellant or mistake on his part so as to plead *non est factum*.

It is trite law that a discharge voucher is a contract in its own right by which parties free themselves from obligations they had entered into prior.

In **Trinity Prime Investment Ltd V Lion of Kenya Insurance Co. [2015] eKLR**, the Court of Appeal held:
"The execution of a discharge voucher, we agree with the learned Judge constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was fully discharged".

The court expressed similar sentiments in **Coastal Bottlers Ltd V Kimathi Mithika (supra)**.

The foregoing sentiments apply on all fours to the circumstances of this instant case. The respondent admitted having signed a discharge voucher and did so in the presence of an advocate and a witness and was thus bound by its contents hook, line and sinker.
The respondent waived his right to pursue further claims against the appellant relating to the employment relationship and the suit he instituted against the appellant ought to have been dismissed.

Relatedly, the respondent's conduct, likewise, estopped him suing the appellant consistent with the doctrine of promissory or equitable estoppel as espoused in **Central London Property Trust Ltd V High Trees House Ltd [1947] KB 130** and exquisitely elucidated by Lord Denning L. J. in **Combe V Combe [1951] 2KB 215.**

Having signed the discharge voucher, the respondent made a representation to the appellant that he would not institute any proceedings against the appellant after payment of Kshs.33,086.00. The appellant relied on the representation and paid the sum of Kshs.33,086.00. in

the belief that no action would be filed against it by the respondent. The respondent was estopped from instituting any claim against the appellant as it would be inequitable to do so.

The appellant was fully discharged.

See in this regard, **Century Automobiles V Hutchings Biemar Ltd [1965] EA 304**.

Having found that the respondent waived his right to pursue further claims against the appellant by signing a discharge voucher on 29th July, 2021, the court's finding that termination of his employment was unfair is of no consequence.

Finally, in the court's view, other than disregarding the discharge voucher which was an important piece of evidence and on which the case ought to have turned, the learned trial magistrate cannot be faulted for having misapprehended or misapplied the evidence on record. Save as adverted to elsewhere in this judgment, the trial court's judgment was consistent with the evidence availed by the parties.

The upshot of the foregoing is that the appellant's appeal succeeds. The judgment of the trial court is set aside in its entirety and in its place an Order dismissing the respondent's case in the Magistrate's court with costs.

Parties shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF SEPTEMBER, 2025.

DR. JACOB GAKERI
JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew

undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE